

~~FILED FOR THE COURT~~

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GERRY GP PHONGBOUPHA,

Petitioner,

vs.

WARDEN A. HEDGPETH,

Respondent.

No. C 12-1025 RMW (PR)

ORDER GRANTING  
PETITIONER'S REQUEST TO  
DISMISS UNEXHAUSTED  
CLAIM; ORDER TO SHOW  
CAUSE

Petitioner, a state prisoner proceeding pro se, filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 12, 2012, the court granted respondent's motion to dismiss for failure to exhaust and directed petitioner to elect one of three options. On November 6, 2012, petitioner filed a pleading entitled "Election by Petitioner," in which he chose to delete his unexhausted claim and proceed with his exhausted claims.

Accordingly, Petitioner's request to continue with only the exhausted claims (Claims 1-4), and dismiss the unexhausted claim (Claim 5) is GRANTED. The court renews its order to show cause to respondent as to why the petition should not be granted as to the remaining four claims: (1) Petitioner's right to due process was violated when he was not allowed to be present or consult with counsel when the trial judge had an ex parte meeting with Juror Number 7; (2) the trial court improperly coerced a jury verdict after learning that they were deadlocked by giving them a supplemental instruction; (3) the "kill zone" instruction to the jury should not have

1 been given with respect to the attempted murder charge in counts 2, 3, and 4; and (4) the trial  
 2 court erred in admitting hearsay testimony, in violation of his rights to due process and  
 3 confrontation.

#### 4 CONCLUSION

5 1. Petitioner's request to proceed with only the exhausted claims and dismiss Claim  
 6 5 (ineffective assistance of counsel) is GRANTED.

7 2. Respondent shall file with the court and serve on petitioner, within **sixty**  
 8 **days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
 9 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
 10 granted. Respondent shall file with the answer and serve on petitioner a copy of all portions of  
 11 the state trial record that have been transcribed previously, and that are relevant to a  
 12 determination of the issues presented by the petition.

13 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the  
 14 court and serving it on respondent within **thirty days** of his receipt of the answer.

15 3. It is petitioner's responsibility to prosecute this case. petitioner is reminded that  
 16 all communications with the court must be served on respondent by mailing a true copy of the  
 17 document to respondent's counsel. Petitioner must keep the court and all parties informed of any  
 18 change of address by filing a separate paper captioned "Notice of Change of Address." He must  
 19 comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal  
 20 of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

21 IT IS SO ORDERED.

22 DATED: FFB:ETG  
 23

*Ronald M. Whyte*  
 RONALD M. WHYTE  
 United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

GERRY PHONGBOUPHA,  
Plaintiff,

Case Number: CV12-01025 RMW

**CERTIFICATE OF SERVICE**

v.

A HEDGPETH et al,  
Defendant.

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 3, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Gerry GP Phongbouphe G-29087  
Salinas Valley State Prison  
PO Box 1050  
Soledad, CA 93960

Dated: December 3, 2012

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk